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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-826

IGNATIUS J. BROUSSARD, JR.,

Petitioner,

vs.

RODERICK R. PATTON, CO., UNITED STATES AIR FORCE, BASE COMM., MAFB, JACK J. CATTON, LT. GEN., UNITED STATES AIR FORCE, COMM. 15TH AF, MAFB, ROBERT C. SEAMANS, JR., SECRETARY OF THE AIR FORCE,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Ignatius J. Broussard, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 21, 1972.

Opinions Below.

The opinion of the court below is officially reported at 466 F. 2d 816. It is given in full in the Appendix, *infra*, beginning at page 1 thereof. The notation "App." below refers to the said Appendix.

Statement.

Petitioner was an airman first class in the United States Air Force, stationed at Kadena Air Base, Okinawa. He was arrested on March 18, 1969, and charged with violation of Article 85, Uniform Code of Military Justice, 10 U.S.C. §885 (desertion). [App. 1.]

The desertion date specified was October 1, 1964. [App. 1.] On December 6, 1967, the Assistant Chief, Airmen Branch, Directorate of Personnel Data and Records, had written to petitioner's parents:

> "This is to advise that the Department of the Air Force is making no further effort to apprehend AIC Broussard since he is a peacetime deserter and, as such, the Statute of Limitations has expired."

The FBI was also notified that petitioner was no longer being sought. Nevertheless, as above noted, on March 18, 1969, he was arrested and charged with desertion. A general court-martial convicted him and sentenced him to confinement at hard labor for four months, reduction in grade to E-1, forfeiture of pay and allowances, and a bad conduct discharge. [App. 1-2.]

The statute of limitations, Article 43 of the UCMJ, 10 U.S.C. §843, provides that desertion "in time of war" may be tried and punished at any time without limitation. Peacetime desertion is subject to a three year limitation. There is no claim by the government that petitioner's being a fugitive tolled the statute of limitations. [App. 6, fn.] As stated by the court below, the prosecution of petitioner was therefore barred if he deserted in peacetime, but not if he deserted in time of war. [App. 2.]

Before completion of his confinement, petitioner sought habeas corpus in the Central District of Cali-

fornia to void the sentence imposed upon him. Pursuant to motion relief was denied and petitioner appealed to the court herein below. It remanded to the District Court with instructions that the proceedings be held in abeyance until petitioner exhausted his administrative remedies, after which he could seek a determination on the merits in the District Court. [App. 2.]

Petitioner exhausted his administrative remedies and again resorted to the District Court. It considered the merits of his claim and denied relief on the ground that the military determination was correct. The district judge cited and adopted the decision of the Air Force Court of Military Review in *United States v. Broussard,* 41 CMR 1004 (1970). [App. 2.] Petitioner had presented to that court a claim that October 1, 1964, the date of his alleged desertion, was not "in time of war". That court rejected his claim, "following", as the court below put it, *United States v. Anderson,* 38 CMR 386 (1968). [App. 4.]

Apparently what the court below meant by the term "following" is the fact shown by the record that in the court-martial here no evidence of any kind was offered by the prosecution, or allowed to be offered by the defense, on the question whether the date, October 1, 1964, was, in fact, in time of war, and that on that question the Law Officer in the trial had ruled that the court-martial was bound, as a matter of law, by the *Anderson* case. [R. 3.] The court below then stepped aside from the question by holding that civil courts could only review the determination of a court-martial on the question whether the court-martial lacked jurisdiction, or due process amounting to lack of jurisdiction, and that the issues presented did not rise to that level. [App. 3.]

REASONS FOR GRANTING THE WRIT.

1. In Failing to Hold That the Finding of the Military Court—That the Time of Petitioner's Alleged Desertion Was "Time of War"—on the Basis Solely and Completely of the Corresponding Finding in United States v. Anderson, 38 CMR 386 (1968), Was a Violation of Due Process, the Decision Below Was in Clear Conflict With the Uniform Decisions of the Highest State Courts of the United States.

The majority of the court in the *Anderson* case treated its finding of time of war as only a finding of fact, which clearly it was, 38 CMR at pp. 391-392. Indeed, the court below herein itself held that the term "time of war" for the purpose here referred to "*de facto* war". [App. 4.] But the treatment here as *res adjudicata,* of that finding of fact in a case involving another party, is a violation of due process. The rule is that for *res adjudicata* there must be a substantial identity of parties as well as of subject matter. This is a fundamental principle of due process. 50 C.J.S. Judgments, §763, at fn. 22; *Curtis v. Maryland Baptist Union Assn.,* 5 A. 2d 836, 839, 176 Md. 430, 437; *Schwegman v. Neff,* 29 N.E. 2d 985, 986, 218 Ind. 63; *Rose v. Jacobs,* 329 S.W. 2d 170, 172, 231 Ark. 286; *Davis v. 1st National Bank,* 161 S.W. 2d 467, 473, 139 Tex. 36.

2. If the Decision in the Anderson Case Is Treated Instead as a Conclusion of Law, Because of the View of Only One of Its Judges That the Gulf of Tonkin Resolution Was in Fact a Declaration of War, 38 CMR at Page 388, and Therefore Itself Established a Status of War, the Decision Below Is in Clear Conflict With the Decision of the Virginia Supreme Court in Jackson v. North American Assurance, 212 Va. 177, 183 S.E. 2d 160 (1971).

In the *Jackson* case it was held that the Gulf of Tonkin Resolution was not in itself a declaration of war and therefore did not, of itself, establish a status of war. It follows that if in the *Anderson* case the Gulf of Tonkin Resolution was treated as a declaration of war, that case, and therefore the decision of the court herein below, is in clear conflict with the decision of the Virginia Supreme Court in the *Jackson* case.

3. In Holding That the Issue as to Whether the Date of Desertion Charged, October 1, 1964, Was or Was Not in Time of War, Was Not Jurisdictional, the Decision Below Was in Clear Conflict With Decisions of This Court.

According to the Manual for Courts-Martial, 1969, prescribed by the President of the United States, effective January 1, 1969, court-martial jurisdiction "ceases on discharge from the service *or other termination of that status.*" (Italics supplied.) Moreover, it has been directly held by this court that the jurisdiction of a court-martial depends upon the military status of the accused at the time of trial. *O'Callahan v. Parker,* 395 U.S. 258 (1969); *Toth v. Quarles,* 350 U.S. 11 (1955).

Now, under the regulations issued by the Secretary of the Air Force, AFR 35-73, #21, a "peacetime deserter whose trial for desertion is barred by the statute of limitations" is in the class of deserters who "must NOT [capitals in the original] be apprehended or returned to military control." Those regulations have the force and effect of law. *Juhl v. United States*, (C. Cl.) 383 F. 2d 1009, 1020. They are binding on the government as well as the serviceman. *Service v. Dulles*, 354 U.S. 363, 372.

Clearly then the letter of December 6, 1967, being in compliance with those regulations, was, under the provision above quoted from the Manual for Courts-Martial, an official declaration of "other termination" of petitioner's military status, and therefore of court-martial jurisdiction in respect to him. Clearly therefore also the issue as to whether the date of desertion charged to petitioner was peacetime or wartime was jurisdictional.

Conclusion.

Because of the conflicts cited above, we urge that this proceeding be accepted for review.

GEORGE T. ALTMAN,
Attorney for Petitioner.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Ignatius J. Broussard, Jr., Petitioner-Appellant, vs. Roderick R. Patton, Col., United States Air Force, Base Comm., MAFB, Jack J. Catton, Lt. Gen., United States Air Force, Comm. 15th AF, MAFB, Robert C. Seamans, Jr., Secretary of the Air Force, Respondents-Appellees. No. 72-1064.

[September 21, 1972].

Appeal from the United States District Court for the Central District of California.

Before: KOELSCH, CARTER, and WRIGHT, Circuit Judges.

WRIGHT, Circuit Judge:

This is an appeal from an order denying and dismissing Broussard's petition for a writ of habeas corpus. We affirm.

Broussard was an airman first class in the United States Air Force, stationed at Kadena Air Base, Okinawa. On October 1, 1964, he deserted.

He was arrested on March 18, 1969, and charged with violation of Article 85, Uniform Code of Military Justice, 10 U.S.C. §885 (desertion). A general court-martial convicted him and sentenced him to confinement at hard labor for four months, reduction in

grade to E-1, forfeiture of pay and allowances, and a bad conduct discharge.

Before completion of his confinement, Broussard sought habeas corpus in the Central District of California to void the sentence imposed upon him. Relief was denied and Broussard appealed to this court. We remanded to the district court with instructions that the proceedings be held in abeyance until Broussard exhausted his administrative remedies, after which he could seek a determination on the merits in the district court.

Broussard exhausted his administrative remedies and again resorted to the district court. It considered the merits of his claim and denied relief on the ground that the military determination was correct. The district judge cited and adopted the decision of the Air Force Court of Military Review in *United States v. Broussard*, 41 CMR 1004 (1970).

I

The only significant issue is the application of the statute of limitations to Broussard's desertion. Article 43 of the UCMJ, 10 U.S.C. §843, provides that desertion "in time of war" may be tried and punished at any time without limitation. Peacetime desertion is subject to a three year limitation. The prosecution of Broussard was barred if he deserted in peacetime, but not if he deserted in time of war.

At the outset we must consider the scope of judicial review. We do not sit to supervise the military courts; rather our review is limited. Habeas corpus is available only to guard against the military courts exceeding their jurisdiction, *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Reid v. Covert*, 354 U.S. 1 (1957); *Toth v.*

Quarles, 350 U.S. 11 (1955), and to vindicate constitutional rights. *Burns v. Wilson*, 346 U.S. 137 (1953).

The relevant standard was stated, quite restrictively in *Fischer v. Ruffner*, 277 F.2d 756, 758 (5th Cir. 1960):

> "[E]ither lack of jurisdiction in the technical sense or a want of essential due process amounting to lack of jurisdiction [is] necessary to give the civil courts the power to review judgments of courts martial by habeas corpus."

Following *Burns v. Wilson, supra*, we have ruled that habeas corpus proceedings involving military convictions are limited to determining whether the court-martial had jurisdiction of the person accused and the offense charged and whether it acted within its lawful powers. *Sunday v. Madigan*, 301 F.2d 871 (9th Cir. 1962). We stated:

> "This may include an inquiry as to whether the military have given fair consideration to each of the petitioner's claims. But once it has been concluded by the civil courts that the military had jurisdiction and dealt fully and fairly with all such claims, it is not open to such courts to grant the writ simply to re-evaluate the evidence." *Sunday* at p. 873.

On the issue of our jurisdiction to review Broussard's claim, *Fischer v. Ruffner, supra*, holds, precisely on point, that the civil courts have no jurisdiction to entertain a habeas corpus petition which asserts as the sole ground for release of a convicted military prisoner that he was charged and tried after such action had been barred by the statute of limitations. However it is unnecessary for us to adopt the holding in *Fischer*,

because it is clear that in the case before us the military courts gave "full and fair consideration" to Broussard's claim. *Burns v. Wilson, supra; Sunday v. Madigan, supra.* Hence Broussard is not entitled to the writ. Cf. *Kasey v. Goodwyn,* 291 F.2d 174, 178 (4th Cir. 1961, *cert. denied* 368 U.S. 959 (1962).

Broussard's desertion occurred on October 1, 1964, after the Gulf of Tonkin Resolution (P. L. 88-408, August 10, 1964) but before the attack on American forces at Plieku (February 7, 1965) which initiated general ground fighting in Viet Nam.

Broussard presented the claim that his desertion was not "in time of war" to the Air Force Court of Military Review. *United States v. Broussard, supra.* That court rejected his claim, following *United States v. Anderson,* 38 CMR 386 (1968). The Court of Military Appeals denied review, 41 CMR 402 (1970).

It is an established rule of military law that, for purposes of Article 43, "time of war" refers to *de facto* war and does not require a formal Congressional declaration. *United States v. Bancroft,* 11 CMR 3 (1953); *United States v. Ayers,* 15 CMR 220 (1954); *United States v. Anderson, supra; cf. United States v. Shell,* 23 CMR 110 (1957).

In *Bancroft* the Court of military Appeals considered the extent of hostilities, together with the public posture of the Congress and the Executive, and ruled that the conflict in Korea precipitated a "time of war" for purposes of Article 43, despite the absence of a

formal Congressional declaration of war. *Anderson* made the same determination with regard to the present conflict in Viet Nam.

We do not understand Broussard to question this established case law, except to argue that the "time of war" attributable to the Viet Nam conflict for purposes of Article 43 began on February 7, 1965. Broussard stresses in his brief that, following the reported attack on the destroyers MADDOX and C. TURNER JOY, which led to the Gulf of Tonkin Resolution, there were no incidents of fighting until the attack on Plieku on February 7, 1965.

This claim was given full and fair consideration in *United States v. Anderson, supra.* The Court of Military Appeals thoroughly considered the relevant law and facts and determined that by the date of passage of the Gulf of Tonkin Resolution the Armed Foces were in a "time of war" for purposes of Article 43.

In light of the fact that the Court of Military Appeals gave this issue "full and fair consideration," in light of the fact that this is a uniquely military matter, and in light of the fact that the distinction between the date of passage of the Gulf of Tonkin Resolution and the date of the attack on Plieku is quite narrow, we defer to the judgment of the military court.*

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*We do not find helpful the case of *Jackson v. North American Assurance,* 212 Va. 177, 183 S.E. 2d 160 (1971). That case construes the intent of parties to an insurance contract in using the word "war." The opinion recognizes that the word may have different meanings in different contexts. It turns largely on the doctrine that insurance policies are to be construed against the insurer.

II

Although not treated as a separate issue in his brief, Broussard has brought to our attention a letter from the Air Force to his parents. On December 6, 1967, the Assistant Chief, Airmen Branch, Directorate of Personnel Data and Records, wrote to Broussard's parents:

> "This is to advise that the Department of the Air Force is making no further effort to apprehend A1C Broussard since he is a peacetime deserter and, as such, the Statute of Limitations has expired."

The FBI was also notified that Broussard was no longer being sought.**

We take judicial notice of the fact related in the opinion in *United States v. Broussard, supra,* that on February 7, 1969, the Air Force notified Broussard's parents that the decision in *United States v. Anderson* had held the statute of limitations inapplicable to persons in Broussard's position and that the apprehension notices were being reactivated.

Broussard was not arrested until more than five weeks later.

Broussard has cited no case, nor have we found any, which holds that the giving of information to a potential defendant that the statute of limitations on his alleged offense has run, when the authority conveying the information is honestly mistaken, creates an estoppel against that authority barring future prosecution.

Affirmed.

**There is no claim that Broussard's being a fugitive tolled the statute of limitations.

KOELSCH, Circuit Judge, Concurring Specially:

The majority, as I understand its opinion, puts the judicial seal of approval upon the Court of Military Appeals' determination, on the merits, that Broussard's alleged desertion occurred in "time of war" within the meaning of Article 43, as construed by military courts. Considerable reliance is placed upon *United States v. Anderson*, 38 C.M.R. 386 (1968).

However, in my view, we should declare only that this court lacks jurisdiction to review the military court's determination. As well said by Judge Tuttle, writing for the Fifth Circuit in *Fischer v. Ruffner*, 277 F.2d 756, 759 (5th Cir. 1960):

> ". . . such plea [i.e., bar of limitations] if made and if decided erroneously presented only questions of law and fact not touching on due process or technical jurisdiction of the military courts. Any ruling or denial of relief based thereon is not reviewable by habeas corpus."

I concur in the result.